Supreme Court, U.S.
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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

HILDA RODRIGUEZ, and SAADIA PIMENTEL,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

May the United States obtain automatic dismissal under the fugitive disentitlement doctrine of adverse claims in a civil forfeiture proceeding where (a) the property is located wholly outside the United States, (b) the claimants are neither residents nor citizens of the United States, and the court lacks personal jurisdiction over them, and (c) the indictment from which they allegedly fled was filed only after the claimants objected to the forfeiture, long after the original indictment on which the forfeiture was based, and the only overt acts allegedly involving the claimants were not directed at any action or property within the United States?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-

SARA ALVAREZ, ANIBAL RODRIGUEZ, DOLORES CASTRO, HILDA RODRIGUEZ, and SAADIA PIMENTEL,
Petitioners,

v.

UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is unreported and is reproduced in the Appendix at 1a-2a. The decision of the United States District Court for the Middle District of Florida is unreported and is reproduced at 3a-4a.

JURISDICTION

The Court of Appeals entered its judgment on September 1, 1994. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

At the time the actions below were commenced, 28 U.S.C. § 1355 provided in relevant part:

> The district courts shall have original jurisdiction, exclusive of the courts of the States, of any action or proceeding for the recovery or enforcement of any fine, penalty, or forfeiture, pecuniary or otherwise, incurred under any Act of Congress, except matters within the jurisdiction of the Court of International Trade under section 1582 of this title.

In October, 1992, the statute was amended to add the following provision, among others:

> (b)(1) A forfeiture action or proceeding may be brought in—
>
> > (A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or
> >
> > (B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.
>
> (2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought as provided in paragraph (1), or in the United States District Court for the District of Columbia.

STATEMENT OF THE CASE

The facts of this case are virtually identical to the facts presented by the petition for writ of *certiorari* in *Alvarez v. United States*, No. 94-636, now pending before this Court.

The differences between the cases are that the properties at issue are located in different countries and that only two of the four petitioners in the *Alvarez* case, Hilda Rodriguez and Saadia Pimentel, are petitioners here. Both cases involve an attempt by the United States government to forfeit property located wholly outside the United States that is owned by individuals who are neither citizens nor residents of the United States. Rather than deciding the merits of the claims at issue, the lower court dismissed petitioners' claims to the property because they failed to appear in a criminal case brought against them *after* they raised significant claims on the merits and jurisdictional defenses in the civil forfeiture proceedings.

On February 24, 1989, the government obtained an indictment of Jose Rodriguez Gacha, a relative of petitioners, and 29 other individuals. RE 29.[1] None of these petitioners was named in that indictment. On January 26, 1990, the government filed a superseding indictment. Again, none of these petitioners was named in that indictment. RE 31.

On August 21, 1991, pursuant to 28 U.S.C. §§ 1355 and 2461, 18 U.S.C. § 981, and 21 U.S.C. § 881, the United States filed civil forfeiture actions in the Middle District of Florida to seize various assets allegedly belonging to Mr. Gacha. RE 100. The government contended that the assets were the traceable proceeds of, or were intended to be used in, drug trafficking. RE 99. The civil forfeiture action at issue here sought assets held in bank accounts outside the United States, not in the name of Mr. Gacha, but in the names of companies in which petitioners claimed an interest. Petitioners each filed a verified claim in the action. RE 33, 40.

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[1] References to the Record Excerpts in the Court of Appeals are designated "RE" followed by a page number. References to the record in the district court are designated "R." followed by a docket number.

The *res*, or property, at issue is approximately $4,000,000, held in three bank accounts in Hong Kong. R. 9; RE 34. On October 16, 1991, petitioners filed a motion to dismiss based on lack of *in rem* jurisdiction, since all of the property at issue was located outside the United States. RE 92, 93. Petitioners' position was strengthened on November 4, 1991, when another district court relied on the Eleventh Circuit's decision in *United States v. One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.), *cert. denied*, 487 U.S. 1204 (1988), in holding that the United States did not have *in rem* jurisdiction over money in a Hong Kong bank. *United States v. $3,035,648.50 and $330,000 in Hong Kong and Shanghai Banks*, CIV-91-217E (W.D.N.Y. Nov. 4, 1991).

The government sought two extensions of time within which to file an opposition to the motion to dismiss. R. 21, 26. In the meantime, on November 22, 1991, the government obtained a second superseding indictment, which charged petitioners, along with the numerous other people previously named as defendants, in connection with the alleged conspiracy at the base of the forfeiture action. R. 96. The only specific allegations involving petitioners asserted that they became signatories to bank accounts outside the United States in which proceeds from the alleged cocaine smuggling operation were deposited, including the three accounts in this forfeiture action. The charges against petitioners carried penalties of large fines and up to life imprisonment.

Finally, on December 9, 1991, the government filed its opposition to petitioners' motion to dismiss for lack of jurisdiction. The government distinguished the recent decision in *United States v. $3,035,648.50 and $330,000 in Hong Kong and Shanghai Banks*, in part because "the Colombian Claimants are under criminal indictment." R. 29. In opposing subsequent motions, the government made no secret of its reason for obtaining the superseding indictment against petitioners: it assumed that petitioners would not

appear at their arraignment, and, therefore, it was preparing its own motion to dismiss on the ground that the actions could be "readily disposed of under the fugitive disentitlement doctrine," under which criminal appeals and certain other claims of fugitives may be dismissed without reaching the merits. R. 29.

To no one's surprise, petitioners did not travel to the United States to appear in the criminal case. Thereafter, the district court issued an Order to Show Cause in the civil forfeiture action, stating that it lacked both *in rem* and *in personam* jurisdiction, and citing *One Lear Jet Aircraft*, which based *in rem* jurisdiction on the presence of the *res* in the court's territorial jurisdiction. RE 120-22; R. 59.

The government's response to the Order to Show Cause relied on *Republic National Bank of Miami v. United States*, 504 U.S. __, 113 S. Ct. 554 (1992), and 28 U.S.C. § 1355(b)(2), the venue provision relating to forfeiture of foreign property, which was enacted after the forfeiture action in this case had been filed. The district court accepted the government's argument that 28 U.S.C. § 1355(b)(2) conferred extraterritorial jurisdiction in civil forfeiture cases. RE 128. Petitioners' subsequent motion to dismiss, which argued that 28 U.S.C. § 1355(b)(2) required control of the *res* by the United States courts as of the time of the filing of the complaint, was denied. The district court ordered final judgment of forfeiture on November 18, 1993.

The United States Court of Appeals for the Eleventh Circuit affirmed the district court's dismissals of petitioners' claims in a four-sentence decision, simply stating that "by fleeing from justice, appellants disentitle themselves from invoking the judicial process in a civil forfeiture action." For that proposition, the court cited *United States v. 7707 S.W. 74th Lane*, 868 F.2d 1214, 1216 (11th Cir. 1989), in which the court of appeals had upheld the application of the fugitive disentitlement doctrine to dismiss the claim in a civil forfeiture action involving property wholly *within* the United

States that allegedly belonged to a Colombian under indictment in the United States. App. 2a. The court did not even address the issues of whether the district court below had jurisdiction to entertain the forfeiture actions or whether the government had acted in bad faith in filing its second superseding indictment in response to petitioners' assertions of claims to the property at issue in this case.

REASONS FOR GRANTING THE WRIT

A writ of *certiorari* should issue in this case for the following reasons: (1) the Eleventh Circuit applied a sweeping rule in dismiss petitioners' claims, contrary to this Court's teaching in *United States v. Ortega-Rodriguez*, __ U.S. __, 113 S. Ct. 1199 (1993); (2) the lower court's erroneous application of rules developed in other contexts improperly precluded a determination of whether the action was properly before the district court; and (3) application of the fugitive disentitlement doctrine under the circumstances present here allows the government unfettered ability to indict in bad faith. These three points are set forth in the petition for writ of *certiorari* now pending before this Court in *Alvarez v. United States*, No. 94-636, and the discussion in that petition is incorporated by reference herein.

In addition, the Seventh Circuit's opinion in *United States v. $40,877.59 in United States Currency*, 32 F.3d 1151 (7th Cir. 1994), creates a conflict in the circuits regarding the use of the fugitive disentitlement doctrine to dismiss a claim in a civil forfeiture action. That decision, which was not reported until after the petition in *Alvarez* was filed, is a further basis for review in both *Alvarez* and this case.

CONCLUSION

For the foregoing reasons, and the reasons set forth in the pending petition in *Alvarez v. United States*, this petition for a writ of *certiorari* should be granted or the case held if the petition in *Alvarez* is granted.

Respectfully submitted,

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November 23, 1994

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3476
Non-Argument Calendar

D.C. Docket No. 91-598-CIV-J-10

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FUNDS IN HONG KONG, contained in account nos. 3201514 (in the name of Transcontinental Traders); 3003105 (in the name of Slavia Association); 03026617 (in the name of Fiducorp S.A.) located at Bank of Credit and Commerce International; CERTAIN FUNDS IN HONG KONG, contained in account no. 20164 972-400 (in the name of Slavia Association) located at Dresdner Bank,

Defendants,

SAADIA CONSTANZA ALVAREZ PIMENTAL [sic];
HILDA RODRIGUEZ DE CABRERA,

Claimants-Appellants.

Appeal from the United States District Court for the
Middle District of Florida

(September 1, 1994)

Before TJOFLAT, Chief Judge, DUBINA and BLACK, Circuit Judges.

PER CURIAM:

Appellants appeal the district court's dismissal of their claims to certain funds sought by the Government in a civil forfeiture action. The district court dismissed the claims under the fugitive disentitlement doctrine because Appellants are fugitives from justice in a related criminal case. We have held that, by fleeing from justice, appellants disentitle themselves from invoking the judicial process in a civil forfeiture action. *United States v. 7707 S.W. 74th Lane*, 868 F.2d 1214, 1216 (11th Cir. 1989). Therefore, the district court properly dismissed Appellants' claim.

AFFIRMED.

[Filed September 1, 1994.]

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v. Case No. 91-598-Civ-J-10

CERTAIN FUNDS IN HONG KONG ORIGINALLY CONTAINED IN ACCOUNT NO. 3201514 (IN THE NAME OF TRANSCONTINENTAL TRADERS), BANK OF CREDIT COMMERCE HONG KONG LTD, PRESENTLY HELD IN THE NAME OF THE RECEIVERS FOR TRANSCONTINENTAL TRADERS, INC., HONG KONG AND SHANGHAI BANK CORPORATION, HARCOURT ROAD BRANCH; CERTAIN FUNDS ORIGINALLY CONTAINED IN ACCOUNT NO. 3003105 (IN THE NAME OF SLAVIA ASSOCIATION), BANK OF CREDIT COMMERCE HONG KONG, LTD., PRESENTLY HELD IN THE NAME OF RECEIVERS OF SLAVIA ASSOCIATION, INC. HONG KONG AND SHANGHAI BANK CORPORATION, HARCOURT ROAD BRANCH; and

CERTAIN FUNDS IN HONG KONG ORIGINALLY CONTAINED IN ACCOUNT NO. 20164972-400 (IN THE NAME OF SLAVIA ASSOCIATION), AT DRESDNER BANK, PRESENTLY HELD IN THE NAME OF RECEIVERS OF SLAVIA ASSOCIATION IN HONG KONG AND SHANGHAI BANK CORPORATION, HARCOURT ROAD BRANCH,

Defendants.

FINAL JUDGMENT OF FORFEITURE

Pursuant to the Order of November 1, 1993, granting the government's supplemental motion to dismiss the claims of claimants Saadia Constanza Alvarez Pimentel and Hilda Rodriguez de Cabrera and for entry of final forfeiture judgment, it is hereby

ORDERED and ADJUDGED that all funds contained in the defendant accounts, plus any additional interest accruing thereon, are hereby forfeited to the United States of America.

IT IS SO ORDERED.

DONE and ORDERED at Jacksonville, Florida, this 18th day of November, 1993.

/sig/ William Terrell Hodges
UNITED STATES DISTRICT JUDGE

FILED
JAN 11 1995
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No. 94-636 and 94-943

In the Supreme Court of the United States

OCTOBER TERM, 1994

SARA ALVAREZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

HILDA RODRIGUEZ, ET AL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court properly applied the fugitive disentitlement doctrine to bar petitioners from contesting civil forfeiture proceedings under the circumstances of this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-636

SARA ALVAREZ, ET AL., PETITIONERS[1]

v.

UNITED STATES OF AMERICA

No. 94-943

HILDA RODRIGUEZ, ET AL, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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[1] The caption in No. 94-636 lists five petitioners, including Hilda Rodriguez and Saadia Pimentel, who are also the petitioners in No. 94-943. Neither Rodriguez nor Pimentel filed a claim in any of the four cases addressed by the petition in No. 94-636. See 94-636 Pet. App. 1a-2a (court of appeals captions); but see *id.* at 24a (caption to order denying rehearing in C.A. No. 93-2424).

OPINIONS BELOW

The opinions of the court of appeals (94-636 Pet. App. 1a-3a; 94-943 Pet. App. 1a-2a) are unreported, but the judgments are noted at 20 F.3d 1173-1174 (Table) and 35 F.3d 577 (Table), respectively. The orders of the district court (94-636 Pet. App. 4a-22a; 94-943 Pet. App. 3a-4a; App., *infra*, 1a-5a) are unreported.

JURISDICTION

The judgments of the court of appeals were entered on April 13, 1994, in No. 94-636 and on September 1, 1994, in No. 94-943. Petitions for rehearing in the cases involved in No. 94-636 were denied on June 20, 1994. 94-636 Pet. App. 23a-24a. The petitions for a writ of certiorari were filed on August 29, 1994 (docketed as of October 11, 1994), in No. 94-636 and on November 23, 1994, in No. 94-943. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States filed several civil forfeiture actions (including the five at issue in these two petitions) against funds held in certain foreign bank accounts for which petitioners were the signatories. The forfeiture actions alleged that the funds were subject to forfeiture pursuant to 21 U.S.C. 881(a)(6), as proceeds of narcotics trafficking by the so-called Medellin Cartel, and pursuant to 18 U.S.C. 981(a)(1)(A), as funds involved in money laundering transactions that violated 18 U.S.C. 1956(a)(1). In the cases at issue here, petitioners answered the complaints, claimed some of the funds, and moved to dismiss on the ground that the district court lacked *in rem* jurisdiction over the funds. The United States moved to dismiss petitioners' claims on the ground that petitioners were fugitives from justice in a

related criminal prosecution. The district court entered default judgments for the government as to the unclaimed funds, denied petitioners' motions to dismiss the complaints with respect to funds they claimed, granted the government's motions to dismiss petitioner's claims, and entered orders of forfeiture against all of the funds. The court of appeals affirmed.

1. In February 1989, a grand jury indicted a number of leading members of the Medellin Cartel, including Jose Gonzalo Rodriguez-Gacha, Pablo Escobar, Jorge and Fabio Ochoa, and 26 others, on various charges related to the importation and distribution of cocaine. Among other counts, the indictment sought criminal forfeiture of the proceeds of Rodriguez-Gacha's cocaine trafficking enterprise. In December 1989, Rodriguez-Gacha was shot and killed by Colombian law enforcement officers. In January 1990, the grand jury returned a superseding indictment charging the three primary successors-in-interest to the Rodriguez-Gacha organization (Rogelio Anibal Castro-Rodriguez, Gladys Edilma Alvarez-Pimentel, and Fernando Suarez-Pinzon) with various criminal violations springing from their activities in concealing the organization's narcotics proceeds.

In November 1991 the grand jury returned a third superseding indictment, adding petitioners to the list of those charged with conspiracy to distribute and import cocaine into the United States, in violation of 21 U.S.C. 841 and 952, and with concealing the narcotics proceeds of the Rodriguez-Gacha organization. The conspiracy count alleged that petitioners, all of whom were related in one way or another to Rodriguez-Gacha, opened or acted as signatories for bank accounts into which narcotics proceeds were deposited, and over which Rodriguez-Gacha or his successors in the conspiracy

retained ultimate control.[2] Petitioners did not appear for arraignment on the charges set out in the third superseding indictment.

2. Following the original indictment authorities in the United Kingdom (including the Isle of Man), Switzerland, and Hong Kong, acting at the request of the United States, froze various bank accounts in those countries into which proceeds from Rodriguez-Gacha's narcotics activities had been deposited.[3] The funds in the Swiss accounts were later transferred to an account maintained by the Drug Enforcement Administration (DEA) at a bank in Jacksonville, Florida. See 94-636 Pet. App. 14a-15a.

In August 1991 the United States filed civil forfeiture actions against the funds at issue in these cases. The complaints alleged that the funds were proceeds of the Rodriguez-Gacha organization's narcotics dealings, and therefore subject to forfeiture under 21 U.S.C. 881(a)(6), and that they had been involved in money laundering transactions in violation of 18 U.S.C. 1956, and were therefore forfeitable under 18 U.S.C. 981(a)(1)(A). Petitioners answered the complaints and filed claims to some

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[2] Petitioner Sara Edilma Pimentel de Alvarez is the mother of Gladys Edilma Alvarez-Pimentel, Rodriguez-Gacha's wife and one of the successors to his organization. Petitioner Anibal Castro Rodriguez is the husband of Rodriguez-Gacha's sister and the father of Rogelio Anibal Castro-Rodriguez, another of Rodriguez-Gacha's successors. Petitioner Dolores Rodriguez de Castro is Rodriguez-Gacha's sister, Anibal Castro Rodriguez's wife, and Rogelio Castro-Rodriguez's mother. Petitioner Hilda Rodriguez de Cabrera is also Rodriguez-Gacha's sister. Petitioner Saadia Constanza Alvarez Pimentel is Rogelio Rodriguez-Castro's wife and Gladys Edilma Alvarez-Pimentel's sister.

[3] The United Kingdom and Swiss accounts (at issue in No. 94-636) were frozen in November 1989. The Hong Kong accounts (at issue in No. 94-943) were frozen in July 1991.

of the defendant funds, alleging that the claimed funds were acquired through various legitimate business transactions.[4]

The district court entered judgment for the United States on funds to which petitioners asserted no claim. See, *e.g.*, 94-636 Pet. App. 5a n.1, 15a. As to the contested funds, petitioners moved to dismiss the complaints against the United Kingdom and Hong Kong funds on the ground that in each case the district court lacked jurisdiction over the defendant res. Petitioners deposed the affiant to the forfeiture complaints—a DEA agent involved in the investigation of the movement and laundering of the Rodriguez-Gacha organization's narcotics proceeds—but petitioners neither appeared for depositions noticed by the government nor produced documents in response to the government's requests.

After the grand jury named petitioners in the third superseding indictment returned in November 1991, the government moved to dismiss petitioners' claims in the civil forfeiture proceedings on the ground that petitioners' failure to appear for arraignment under that indictment justified invocation of the fugitive disentitlement doctrine to bar petitioners from defending against the forfeiture actions. In response, petitioners con-

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[4] Petitioner Sara Alvarez filed claims to certain funds at the Bank of Credit and Commerce International (BCCI), Park Lane, London; to certain of the Swiss funds transferred to the DEA's account in Florida; and to the funds in the Isle of Man account. See 94-636 Pet. App. 5a, 16a, 22a. Petitioner Anibal Rodriguez claimed certain funds at BCCI, Edgware Road, London, and certain of the Swiss funds. *Id.* at 9a-10a, 15a. Petitioner Dolores Castro claimed certain of the Swiss funds. *Id.* at 15a. Petitioners in No. 94-943, Saadia Pimentel and Hilda Rodriguez, filed claims to certain funds in the Hong Kong accounts. See 94-943 Pet. App. 3a-4a.

tended that the district court should not apply the disentitlement doctrine because the government indicted them in bad faith in an effort to circumvent further proceedings in the civil forfeiture cases. See 94-636 Pet. App. 7a n.2, 11a n.2, 18a; Claimant's Opp. Memo. to Gov't's Mot. to Dismiss in C.A. No. 93-3476, at 7-9; see also note 8, *infra*.

The district court denied petitioners' motions to dismiss. The court noted that petitioners' filings indicated that they were aware of the indictments against them, yet had voluntarily failed to appear for arraignment. Relying on *United States* v. *7707 S.W. 74th Lane*, 868 F.2d 1214, 1216 (11th Cir. 1989), the court held that each petitioner had, "by her own actions as a fugitive from justice, waived her right to object to [the court's] *in rem* jurisdiction" and "rendered [each] case essentially an 'uncontested action.'" 94-636 Pet. App. 7a, 12a, citing *7707 S.W. 74th Lane*, 868 F.2d at 1217. The court observed that if petitioners were not fugitives, "a substantial objection to *in rem* jurisdiction would be at issue" in those cases involving funds still located outside the United States. 94-636 Pet. App. 7a, 12a. The court rejected, however, petitioners' contention that the government should be prevented from invoking the fugitive disentitlement doctrine because it had indicted them for the purpose of obtaining an unfair advantage in the forfeiture proceedings. The court held that any claim of improper prosecutorial motive could be raised only in the criminal proceeding, to which petitioners had refused to submit. 94-636 Pet. App. 7a n.2, 11a n.1, 18a-19a. The court therefore granted the government's motion to dismiss petitioners' claims, and entered final judgments of forfeiture. *Id.* at 7a-8a, 12a, 19a, 22a; 94-943 Pet. App. 3a-4a.

3. The court of appeals affirmed, in summary reliance on its earlier decision in *United States* v. *7707 S.W. 74th Lane*, *supra*. 94-636 Pet. App. 1a-3a; 94-943 Pet. App. 1a-2a.

ARGUMENT

Petitioners challenge the application of the fugitive disentitlement doctrine to the circumstances of the civil forfeiture proceedings here, in which, among other things, petitioners claim that "the property is located wholly outside the United States," "the claimants are neither residents nor citizens of the United States," and the indictment under which petitioners have failed to appear was filed only after petitioners objected to the civil forfeiture. 94-636 Pet. i; 94-943 Pet. i. That fact-specific challenge does not warrant this Court's review.

1. This Court has consistently held that a defendant's status as a fugitive "disentitles [him] to call upon the resources of the Court for the determination of his claims." *Molinaro* v. *New Jersey*, 396 U.S. 365, 366 (1970); see *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199, 1203-1204 (1993); *Estelle* v. *Dorrough*, 420 U.S. 534, 537 (1975); *Bonahan* v. *Nebraska*, 125 U.S. 692 (1887); *Smith* v. *United States*, 94 U.S. 97 (1876); see also *United States* v. *Sharpe*, 470 U.S. 675, 681 n.2 (1985); *id.* at 721-723 (Stevens, J., dissenting). This "longstanding and established principle of American law" (*Dorrough*, 420 U.S. at 537) is based largely on the equitable principle that a litigant should not be entitled to invoke the protective processes of the law while simultaneously flouting its authority as a fugitive from justice. See, *e.g.*, *Ortega-Rodriguez*, 113 S. Ct. at 1206; *United States ex*

rel. Bailey v. *United States Commanding Officer*, 496 F.2d 324, 326 (1st Cir. 1974).[5]

The courts of appeals have applied the *Molinaro* disentitlement doctrine to bar a wide variety of civil claims pursued by fugitives from criminal justice. See, *e.g.*, *Schuster* v. *United States*, 765 F.2d 1047 (11th Cir. 1985) (review of tax assessment); *Conforte* v. *Commissioner*, 692 F.2d 587 (9th Cir. 1982) (same); *Doyle* v. *United States Dep't of Justice*, 668 F.2d 1365 (D.C. Cir. 1981) (Freedom of Information Act proceeding), cert. denied, 455 U.S. 1002 (1982); *Broadway* v. *City of Montgomery*, 530 F.2d 657 (5th Cir. 1976) (suit for damages and injunctive relief); *Bailey*, 496 F.2d at 326 (challenge to regulation); see also *Conforte* v. *Commissioner*, 459 U.S. 1309, 1312 (1983) (Rehnquist, Circuit Justice) (courts of appeals have applied disentitlement doctrine to civil proceedings "on a

[5] This Court has articulated a number of rationales for the fugitive disentitlement rule. First, the rule is supported by enforceability concerns. As the Court explained in *Smith* v. *United States*, 94 U.S. at 97, it is "clearly within our discretion to refuse to hear a criminal case in error, unless the convicted party, suing out the writ, is where he can be made to respond to any judgment we may render." Second, the rule rests "in part on a 'disentitlement' theory that construes a defendant's flight during the pendency of his appeal as tantamount to waiver or abandonment." *Ortega-Rodriguez*, 113 S. Ct. at 1204. Third, the rule serves a deterrent function by "discourag[ing] the felony of escape and encourag[ing] voluntary surrenders." *Ibid.*, quoting *Estelle* v. *Dorrough*, 420 U.S. at 537. Finally, the Court has indicated that dismissal of a fugitive's appeal "advances an interest in efficient, dignified appellate practice," and thus may be appropriate where flight "operates as an affront to the dignity of the court's proceedings." *Ortega-Rodriguez*, 113 S. Ct. at 1204-1205, 1207.

number of occasions" and Court has previously denied certiorari in that type of case).

Like the court below, see *United States* v. *7707 S.W. 74th Lane*, 868 F.2d 1214, 1216-1217 (1989), the Second, Ninth, and Tenth Circuits have specifically applied the disentitlement doctrine to hold that fugitives may not avail themselves of the judicial process to challenge the forfeiture of assets acquired in connection with their criminal activity. *United States* v. *Timbers Preserve, Routt County, Colorado*, 999 F.2d 452, 453-455 (10th Cir. 1993); *United States* v. *Eng*, 951 F.2d 461, 464-467 (2d Cir. 1991); *United States* v. *$45,940 in United States Currency*, 739 F.2d 792, 797-798 (2d Cir. 1984); *United States* v. *$129,374 in United States Currency*, 769 F.2d 583, 586-587 (9th Cir. 1985), cert. denied *sub nom. Geiger* v. *United States*, 474 U.S. 1086 (1986). In addition, the Third Circuit has indicated that it would apply the doctrine in an appropriate forfeiture case. *United States* v. *Contents of Accounts Numbers 3034504504 & 144-07143 at Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 971 F.2d 974, 986 n.9 (1992), cert. denied, 113 S. Ct 1580 (1993).

2. In the courts below, petitioners challenged neither the existence of the fugitive disentitlement doctrine nor its general applicability to civil forfeiture cases. See, *e.g.*, Reply Br. of Pet. Alvarez in C.A. No. 92-2294, at 1 ("The Appellant has never taken the position that a court has no discretion to dismiss a forfeiture case because the Claimant is a fugitive.").[6] Rather, petitioners focused on

[6] Petitioners were all represented in the proceedings below by the same attorney (who is also their counsel of record in this Court), and with some exceptions (see, *e.g.*, pages 11-12, *infra*) they filed separate but virtually identical papers in the various district court and appellate proceedings.

the merits of their argument that the district court lacked *in rem* jurisdiction over funds in accounts outside the United States, on their contention that the United States indicted them in bad faith, and on the district court's alleged failure to respect "the discretionary nature of the [disentitlement] doctrine" in applying it to petitioners' particular circumstances. See, *e.g.*, *id.* at 1-4, 5-6; Br. of Pet. Alvarez in C.A. No. 92-2294, at 14 (summary of argument); Supp. Br. of Pet. Alvarez in C.A. No. 92-2294 (addressing merits of *in rem* jurisdictional issue).

The petitions in these cases are similarly limited to challenging application of the disentitlement doctrine to what petitioners characterize as the "extraordinary circumstances" of their case. 94-636 Pet. 9; see also *id.* at i, 7-9 (attacking court of appeals' "sweeping" application of doctrine), 10-12 (arguing that jurisdictional questions were sufficiently substantial to require consideration), 12-14 (suggesting government abuse and bad faith); 94-943 Pet. 6 (summarizing and incorporating same arguments). Particularly in view of the "limited * * * scope" of this Court's review of rules, like those falling under the rubric of fugitive disentitlement, "adopted by the courts of appeals in their supervisory capacity," *Ortega-Rodriguez*, 113 S. Ct. at 1205, petitioners' fact-bound contentions do not merit further review.

3. In any event, petitioners' arguments lack merit. Although the petition in No. 94-636 notes in passing (at 9) that petitioners "have not fled from custody or from the United States," neither below nor in this Court have petitioners seriously challenged the district court's conclusion (see, *e.g.*, Pet. App. 6a, 18a) that they are "fugitives" for purposes of the disentitlement doctrine. See also *United States* v. *Eng*, 951 F.2d at 464-465; *United States* v. *7707 S.W. 74th Lane*, 868 F.2d at 1215-

1216; *Schuster* v. *United States*, 765 F.2d 1047, 1050-1051 (11th Cir. 1985); *United States* v. *$45,940 in United States Currency*, 739 F.2d at 796. Petitioners have relied instead on speculative allegations that the government acted in bad faith in seeking the separate criminal indictment to which petitioners have refused to respond. See, *e.g.*, 94-636 Pet. App. 18a ("[Petitioners'] only response * * * is that the United States should not be permitted to avail itself of the fugitive disentitlement doctrine '. . . where it has indicted the claimants for the purpose of obtaining an unfair advantage in the civil forfeiture cases.'").

Those allegations are unfounded. The United States has a compelling interest in bringing to justice all those who have contributed to the illicit and tremendously damaging operations of the Rodriguez-Gacha organization and the rest of the Medellin drug cartel. The fact that some of those involved in the organization's financial operations may have been identified or indicted later than its ringleaders, and after the identification of forfeitable property, casts no doubt on the existence of legitimate grounds for prosecution. And absent a significant threshold showing of unconstitutional motive, the decision to indict is not open to review by the courts. See *Wayte* v. *United States*, 470 U.S. 598, 607-608 (1985). In any event, as the district court correctly held, even if petitioners could suggest unconstitutional grounds for the decision to indict them, "the only proper forum in which to present that claim would be the criminal proceeding," not a civil forfeiture case. 94-636 Pet. App. 19a; see also *id.* at 7a n.2, 11a n.1.

Petitioners' only other argument for avoiding application of the disentitlement doctrine is their claim that they raised a substantial objection to the district court's *in rem* jurisdiction, and that that objection should have

been litigated on the merits. See 94-636 Pet. 8-9, 11-12; 94-943 Pet. 6. As petitioners concede (94-636 Pet. 4 n.2), they did not challenge jurisdiction in the district court with respect to any of the funds transferred to the DEA's Florida account by the government of Switzerland. Whatever the merits of their current contention (*id.* at 4) that *in rem* jurisdiction should have been determined at the time the forfeiture action against the funds was filed, petitioners have therefore waived any jurisdictional claim with respect to a substantial portion of the funds at issue in these cases.[7] See, *e.g.*, 94-636 Pet. App. 6a (objection to *in rem* jurisdiction may be waived); *Cactus Pipe & Supply Co.* v. *M/V Montmartre*, 756 F.2d 1103, 1107 (5th Cir. 1985) (same).

As to those cases in which petitioners did question jurisdiction, in No. 94-943 the district court ordered the government to address the issue on the merits. The government responded in part by producing documentation demonstrating that the defendant funds had been frozen by the Hong Kong authorities at the United States' request, and would be available for appropriate process to enforce a final forfeiture order entered by the

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[7] Ignoring interest, the Swiss funds subject to the government's original complaint amounted to approximately $8.9 million. 94-636 Pet. App. 15a. Of that total, the district court entered an unchallenged default judgment with respect to some $4.7 million, which is no longer at issue. *Ibid.* By way of comparison, the defendant funds held at BCCI Park Lane, London (see note 4, *supra*) totaled approximately $575,000, of which petitioners failed to claim approximately $143,000. See 94-636 Pet. App. 5a n.1; U.S. Opp. to Mot. for Stay Pending Appeal in C.A. No. 92-2294, at 4 (served Sept. 9, 1992). Overall we are informed that the complaints in these cases sought forfeiture of approximately $16.9 million, of which petitioners failed to claim approximately $5.2 million.

district court. See Gov't Br. in C.A. No. 93-3476, at 5-6; see also *id.* at 34-50 (responding at length to petitioners' jurisdictional arguments). The district court entered the judgment of forfeiture only after accepting the government's jurisdictional submission. App., *infra*, 4a-5a.[8]

In two of the cases involved in No. 94-636 the district court expressed concern over the jurisdictional issue, but declined to resolve that issue because of the court's application of the disentitlement doctrine. 94-636 Pet. App. 7a, 12a; compare *id.* at 14a-19a (Swiss funds), 22a (no discussion). The court's concern, however, was

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[8] This order is not included in the appendix to the petition in No. 94-943, although it is cited in the final judgment reprinted there. 94-943 Pet. App. 4a. After the district court granted the government leave to file an amended complaint (made necessary because of movement of the defendant funds, originally held at BCCI's Hong Kong affiliate and at Dresdner Bank Hong Kong, to receivership accounts at a new bank) in March 1993, petitioners filed new claims but failed to file a new answer, as required by Rule C(6) of the Supplemental Rules for Admiralty and Maritime Claims. Petitioners also failed to respond to the United States' subsequent supplemental motion to dismiss their claims under the fugitive disentitlement doctrine. See App., *infra*, 2a & n.1. After the court granted the government's motion on November 1, 1993, *id.* at 4a-5a, petitioners asked the court to reconsider and alter its judgment. The court granted that motion to the extent of reconsidering its conclusion in light of the arguments contained in an earlier response to the government's first motion to dismiss, but declined to alter or amend the judgment. *Id.* at 2a. Because it granted the government's motion on the merits, the court had no occasion to hold petitioners to their failure to respond to the supplemental motion to dismiss, or to rule on the effect of their procedural default under the Admiralty Rules. Those defaults provide, however, separate and adequate grounds for the judgment below in No. 94-943. See Gov't Br. in C.A. No. 93-3476, at 30-34.

misplaced. This Court has made clear that *in rem* jurisdiction depends on the district court's "actual *or constructive* control of the res." *Republic Nat'l Bank* v. *United States*, 113 S. Ct. 554, 559 (1992) (emphasis added). In these cases, as in the case of the Hong Kong accounts at issue in No. 94-943, the United States requested and received cooperation from the relevant foreign governments in freezing the defendant funds before initiation of forfeiture proceedings, under agreements providing for such cooperation with respect to the seizure and forfeiture of drug trafficking proceeds. See Agreement Concerning the Investigation of Drug Trafficking Offences and the Seizure and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, Feb. 9, 1988, U.S.-U.K., T.I.A.S. No. 11,649; Agreement Concerning Confiscation and Forfeiture of Proceeds and Instrumentalities of Drug Trafficking, Nov. 23, 1990, U.S.-H.K.; see also Treaty on Mutual Legal Assistance in Criminal Matters, May 25, 1973, U.S.-Switz., 27 U.S.T. 2019. The funds were therefore at all times under the constructive control of the district court for jurisdictional purposes, and available for execution of its final judgments in accordance with those treaties and the laws of the relevant jurisdictions.[9]

In any event, whatever jurisdictional questions might have existed at the time these actions were filed,

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[9] Indeed, as petitioners conceded below (see, *e.g.*, Pet. Alvarez's Supp. Br. in C.A. No. 92-2294, at 19 n.9), the United Kingdom has already complied with default judgments entered in these cases by splitting forfeited proceeds with the United States. And, as noted above, the Swiss government turned the funds at issue over to United States authorities pending disposition of the forfeiture proceedings. 94-636 Pet. App. 15a. There is therefore nothing to support, and much to refute, any concern that the funds in these cases were outside the jurisdictional reach of the district court.

petitioners concede that 28 U.S.C. 1355 (1988 & Supp. V 1993) now grants district courts "subject matter jurisdiction over actions brought for any forfeiture, specifically including * * * forfeiture of property outside the United States." 94-636 Pet. 13. Section 1355(b)(2) (Supp. V 1993) refers even more specifically to forfeitable property that "has been detained or seized pursuant to legal process or competent authority of a foreign government," as in each of the cases at issue under these petitions. Whether or not that provision, enacted in 1992 by the Annunzio-Wylie Anti-Money Laundering Act, Pub. L. No. 102-550, tit. XV, § 1521, 106 Stat. 4062, applies retroactively to this case, see *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1502 (1994), citing *Republic Nat'l Bank*, 113 S. Ct. at 565 (Thomas, J., concurring in part and in the judgment), it resolves the question for the future. Thus, to the extent that petitioners' jurisdictional point is actually presented on the facts of these cases, it is of little continuing importance. Neither the argument itself nor the district court's failure to consider it in some of the cases below merits any further review.

4. Finally, the petition in No. 94-943 notes (at 6) that in *United States* v. *$40,877.59 in United States Currency*, 32 F.3d 1151 (1994), the Seventh Circuit recently rejected the use of the fugitive disentitlement doctrine in any civil forfeiture case.[10] That decision

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[10] The Seventh Circuit reasoned that forfeiture proceedings differ from other contexts in which the disentitlement doctrine has been applied because the government, rather than the fugitive, initiates the forfeiture proceeding. See 32 F.3d at 1154-1155. The court also expressed concern, on the facts of the case before it, with the adequacy of the government's allegations that the claimant was a fugitive and that the funds were subject to forfeiture. *Id.* at 1156-1157. The latter concerns are not at issue in

deepens a longstanding conflict in the circuits over the government's ability to invoke the doctrine at all in such a case. Compare *United States* v. *$83,320 in United States Currency*, 682 F.2d 573, 576 (6th Cir. 1982) (refusing to apply doctrine out of concern for third-party claimants or creditors of fugitive), with *United States* v. *$129,374 in United States Currency*, 769 F.2d 583, 589 (9th Cir. 1985) (rejecting Sixth Circuit's analysis), cert. denied *sub nom. Geiger* v. *United States*, 474 U.S. 1086 (1986), *United States* v. *Eng*, 951 F.2d at 465 (same), and other cases cited at page 9, *supra*; see also *United States* v. *Pole No. 3172, Hopkinton*, 852 F.2d 636, 643-644 (1st Cir. 1988) (refusing to apply doctrine where it was unclear whether the claimant's status as a fugitive in the criminal case was related to the civil forfeiture, and because the record failed to establish that the claimant had notice of the forfeiture proceeding); *United States* v. *Eng*, 951 F.2d at 467 (distinguishing *Pole No. 3172*).

While that conflict may call for review by this Court in an appropriate case, the question presented in these cases would not require its resolution. As noted above (see pages 9-10, *supra*), petitioners have consistently challenged only the lower courts' application in petitioners' cases of a doctrine that petitioners concede

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this case: petitioners have not contested that they are "fugitives" for purposes of the disentitlement doctrine, and the allegations linking funds in the defendant accounts to the Rodriguez-Gacha organization's drug trafficking activities are clear and substantial. See, *e.g.*, Aff. Attached to Complaint in C.A. No. 92-2295, at 5-9 (describing raid on Colombian ranch that disclosed various financial records relating to properties held in the name of Rodriguez-Gacha and his relatives, including records relating specifically to accounts at issue in these proceedings, and statements given by an individual who served as an investment adviser to Rodriguez-Gacha).

to be generally available in civil forfeiture proceedings, and the question presented in both petitions reiterates only that limited claim. 94-636 Pet. i; 94-943 Pet. i. While the body of the petition in No. 94-943 notes the existence of the Seventh Circuit's decision, neither petition cites any of the prior conflicting authority on the issue. See, *e.g.*, 94-636 Pet. 7; see also *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 114 S. Ct. 425, 427 n.5 (1993) (per curiam). Under the circumstances, the Court need not reach beyond petitioners' own submissions to consider the availability *vel non* of the fugitive disentitlement doctrine in the factually and procedurally complicated context of these cases.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1995

APPENDIX A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 91-698 Civ-J-10

UNITED STATES OF AMERICA,
PLAINTIFF

vs.

CERTAIN FUNDS IN HONG KONG ORIGINALLY CONTAINED IN ACCOUNT NO (S). 3201514 (IN THE NAME OF TRANSCONTINENTAL TRADERS); 3003105 (IN THE NAME OF SLAVIA ASSOCIATION); AND

CERTAIN FUNDS IN HONG KONG CONTAINED IN ACCOUNT NO. 20164972-400 (IN THE NAME OF SLAVIA ASSOCIATION) LOCATED AT DRESDNER BANK,
DEFENDANTS

[Filed Nov. 19, 1993]

ORDER

Before the Court is the Claimants' emergency motion to amend or alter judgment and for reconsideration of judgment (Doc. 96). The claimants failed

to respond to the Government's supplemental motion to dismiss and the Court granted the Government's motion. The Claimants now argue that the Court should reconsider its order because the Court did not consider the Claimants' response (Doc. 38) to the Government's first motion to dismiss.[1]

The Court has reconsidered its order in light of the Claimants' response to the Government's first motion to dismiss. However, the response did not convince the Court that it should alter or amend its judgment in any way. The Court's order (Doc. 94) to dismiss the claims will remain unchanged.

Further, the Claimants argue that the Court should permit them to file a response to the Government's supplemental motion to dismiss. The motion was filed on June 4, 1993 and the Claimants did not respond within ten days as required by Rule 3.01 of Local Rules for the Middle District of Florida. Further, the Claimants still had not responded when the Court ruled on the motion over four months after the motion was filed. The Claimants will not be permitted to file a response to the Government's motion at this late date, after the Court already has granted the motion.

Accordingly, upon due consideration, the Claimants' emergency motion to amend or alter judgment and for reconsideration of judgment (Doc. 96) is granted to the extent that the Court has reconsidered its order in light of the Claimants' response to the Government's first motion to dismiss. Otherwise, the

[1] The Court deferred ruling on the Government's first motion to dismiss (*See* Doc. 55). The Government later filed an amended complaint and the Claimants filed new claims. The Government then filed its supplemental motion to dismiss and the Claimants did not respond to that motion.

motion is DENIED and the Court's previous order will remain unaltered.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida, this *18th* day of November, 1993.

_____

United States Distrct Judge

Copy to counsel of record

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No. 91-698 Civ-J-10

UNITED STATES OF AMERICA,
PLAINTIFF

vs.

CERTAIN FUNDS IN HONG KONG ORIGINALLY CONTAINED IN ACCOUNT NO(S). 3201514 (IN THE NAME OF TRANSCONTINENTAL TRADERS); 3003105 (IN THE NAME OF SLAVIA ASSOCIATION); AND

CERTAIN FUNDS IN HONG KONG CONTAINED IN ACCOUNT NO. 20164972-400 (IN THE NAME OF SLAVIA ASSOCIATION) LOCATED AT DRESDNER BANK,
DEFENDANTS

ORDER

Before the Court is the United States' supplemental motion to dismiss claims of Saadia Constanza Alvarez-Pimentel and Hilda Rodriguez De Cabrera and for entry of final forfeiture judgment (Doc. 93). The motion is ripe and the claimants have not responded.

The Court, by order entered March 3, 1993 (Doc. 66), directed the Government to submit properly

authenticated documentation to demonstrate that the funds in this case were seized by competent authority of the sovereign of the site of the funds. The Government complied with the Court's directive (Doc. 78). Now, the Government moves to dismiss the claims pursuant to the fugitive disentitlement doctrine.

Upon due consideration, the Government's motion to dismiss claims of Saadia Constanza Alvarez-Pimentel and Hilda Rodriguez De Cabrera's and for entry of final forfeiture judgment (Doc. 93) is GRANTED for the reasons stated in the Government's memorandum in support of the motion. The claims are dismissed and the Government shall file a form judgment of forfeiture in this case within ten (10) days.

IT IS SO ORDERED.

DONE AND ORDERED at Jacksonville, Florida, this *1st* day of November, 1993.

United States Distrct Judge

Copy to counsel of record

Supreme Court, U.S.
FILED
JAN 24 1995
OFFICE OF THE CLERK

(3) (3)

Nos. 94-636 and 94-943

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

SARA ALVAREZ, ANIBAL RODRIGUEZ, DOLORES CASTRO, HILDA RODRIGUEZ, and SAADIA PIMENTEL,

Petitioners,

v.

UNITED STATES,

Respondent.

HILDA RODRIGUEZ and SAADIA PIMENTEL,

Petitioners,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF FOR PETITIONERS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

Nos. 94-636 and 94-943

SARA ALVAREZ, ANIBAL RODRIGUEZ, DOLORES CASTRO, HILDA RODRIGUEZ, and SAADIA PIMENTEL,
Petitioners,

v.

UNITED STATES,
Respondent.

HILDA RODRIGUEZ and SAADIA PIMENTEL,
Petitioners,

v.

UNITED STATES,
Respondent.

REPLY BRIEF FOR PETITIONERS

The opposition to these petitions never comes to grips with the central question of whether the government has the right to use the fugitive disentitlement doctrine in civil forfeiture actions where neither the claimants nor the property at issue are located in the United States. Instead, it spends most of its time chipping away at minor aspects of the claims filed by petitioners, leaving the basic question of governmental power unanswered. Because the question presented in both petitions persists, this Court should grant review.

1. Since filing the petition for *certiorari* in *Alvarez* last August, petitioners learned of the Seventh Circuit opinion in *United States v. $40,877.59 in United States Currency*, 32 F.3d 1151 (7th Cir. 1994), issued just before the petition was filed. The government states that the Seventh Circuit's decision "deepens a longstanding conflict in the circuits over the government's ability to invoke the fugitive disentitlement doctrine at all" to prevail in civil forfeiture cases. Opp. at 15-16. In fact, the Seventh Circuit's absolute rejection of the use of the doctrine in this context goes further than any prior opinion and creates a direct conflict with the decisions below and those of other circuits.

The Seventh Circuit held: "When applying the doctrine in government initiated civil forfeiture actions, the real injustice is that the government is allowed to confiscate property on mere allegation." 32 F.3d at 1155. Relying in large part on *Ortega-Rodriguez v. United States*, __ U.S. __, 113 S. Ct. 1199 (1993), *Hovey v. Elliott*, 167 U.S. 409 (1897), and other cases of this Court, the court of appeals found that use of the doctrine in this context raises significant constitutional questions. "Although a fugitive's conduct may be an affront to the court, it is a greater stain on our jurisprudence for the court in turn to discard those procedures that safeguard right and fair decisions." 32 F.3d at 1157. The court further recognized the significant procedural advantages enjoyed by the government in civil forfeiture actions, in which claimants bear the ultimate burden of proof. *Id.* at 1156. To afford claimants a hearing, the court found, "is only a slight burden on the government," *id.*, a burden which due process requires.

The Seventh Circuit's refusal to apply the fugitive disentitlement doctrine in a civil forfeiture proceeding, based on analysis of the case law and constitutional principles, stands in stark contrast to the Eleventh Circuit's rote application of that doctrine to dismiss the civil forfeiture

cases involved in these petitions. *Certiorari* should be granted to resolve the circuit courts' conflict on this issue.

2. Notwithstanding the undisputed conflict in the circuits, the government argues that the conflict should not be resolved here for two reasons. First, the government asserts that, because these petitions do not challenge the use of the doctrine in *all* civil forfeiture actions, but only in actions where neither the property nor the claimants are located in the United States, these petitions do not require resolution of the broadest conflict, and therefore are not appropriate vehicles for considering the issue at all. Opp. at 16. The conflicting views of the Eleventh and Seventh Circuits, however, are directly at issue in these petitions. Although the case before the Seventh Circuit did not involve the *in rem* jurisdictional issue presented in the petitions—and in fact, the Eleventh Circuit's cursory opinions below did not address the issue either—both circuits' decisions apply to a broad category of civil forfeiture cases that indisputably includes the cases at bar. That the facts here may also raise narrower questions about the use of the fugitive disentitlement doctrine does not eliminate the conflict or suggest that only the broader issue is worthy of review.

Second, in a confusing argument, the point of which seems to be that this Court should not consider the conflict in the circuits in ruling on these petitions, the government cites to footnote 5 in *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 114 S. Ct. 425 (1993). In that footnote, the Court ruled that an intervention issue that was not included in the question presented there, but was discussed in the merits briefs and argued, was not properly before the Court. A conflict in the circuits, however, is not an "issue," as that word is used in *Izumi*. Rather, it is a reason why a question presented may be certworthy. Sup. Ct. R. 10 (1994). And, as reinforced by the government's opposition, Opp. at 16-17, and *United States v. $40,877.59 in United States Currency*, it is a compelling reason here.

3. The government faults the petitions as "fact-specific challenge[s]." Opp. at 7. Indeed, the question presented does ask whether use of the fugitive disentitlement doctrine is proper in specific circumstances. The petitions do not, however, raise any issue as to the existence of the facts or raise factual disputes. Rather, the common question presented in both petitions is highly susceptible to repetition and raises important unresolved legal issues. Every case before this Court arises in a factual setting, but that does not render their legal issues unworthy of review.

4. The government argues that the question of jurisdiction in these cases is of "little continuing importance" in light of 28 U.S.C. § 1355(b)(2) (Supp. 1993), which granted subject matter jurisdiction to district courts over civil forfeiture actions regarding property outside the United States. Opp. at 15. The issue here, however, involves not *subject matter* jurisdiction but *in rem* jurisdiction. These two concepts are, of course, quite different. Accordingly, section 1355(b)(2) does not diminish the significance of the issue presented here. If anything, the authorization to proceed contained in section 1355(b)(2) makes the government's action in these cases even *more* likely to recur. Indeed, because the government is repeatedly bringing civil forfeiture actions in cases where both the property at issue and the claimants are located outside the United States, the question presented is increasingly significant.[1]

5. In an effort to establish that the district court had *in rem* jurisdiction over the civil forfeiture actions, despite the undisputed fact that the property at issue was located outside the United States, respondent equates the government's ability to obtain the cooperation of foreign governments with court control over the property. Opp. at 14. *In rem* jurisdiction, however, refers not to the ability of

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[1] Indeed, counsel of record is aware of at least 14 such cases currently pending in the district courts and Eleventh Circuit.

the Executive Branch to recover assets abroad, but to the *court's* power over those assets. In two of the decisions below, the district court itself questioned that power. Pet. 94-636 at 7a, 12a.

The Agreements cited, Opp. at 14, do not purport to grant the United States courts jurisdiction over property in the United Kingdom or Hong Kong, or to provide the courts control over such property. Moreover, the United Kingdom's cooperation in transferring assets after *default judgments*, on the condition that it receive half the proceeds, Opp. at 14 & n.9, hardly establishes the *in rem* jurisdiction of the district court. *In rem* jurisdiction is waivable, must be specifically challenged, and was probably not challenged in circumstances where a default judgment was entered. Rather, unlike the judgments below, default judgments in civil forfeiture actions usually occur in *uncontested* proceedings, where no claims are made to the property. *See* Fed. R. Civ. P. 55(a); Supp. R. Admir. A. Although the foreign banks agreed to freeze the assets at issue here, the opposition does not state, as it cannot, that either the United Kingdom or Hong Kong has agreed to transfer these *contested* assets to the United States.[2]

6. Further attempting to belittle the merits of petitioners' underlying arguments, the government asserts that "Petitioners have relied . . . on speculative allegations that the government acted in bad faith in seeking the separate criminal indictment . . . ." Opp. at 11. First, there is little question that petitioners made out a *prima facie* case of retaliatory indictment. No further proceedings were had on the issue, however, as a result of the government's invocation of the fugitive disentitlement doctrine. Absent the

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[2] Even if the district court had *in rem* jurisdiction over the funds that were actually transferred to Florida, the government concedes that several million dollars remain at issue, over which the court has no "actual or constructive control." Opp. at 12 n.7.

government's response, petitioners could do no more, since the government had control over all the evidence on this point. Second, the government never denied, in any of the numerous written submissions and oral proceedings before the district courts and appellate court below, petitioners' allegations regarding the government's motive in indicting petitioners.

The government also contends that the proper forum for challenging its motive in indicting petitioners "would be the criminal proceeding." *Id.* Yet it was the government which brought the civil forfeiture actions and which, after obtaining an indictment against the claimants in those actions, moved to dismiss their claims on the basis of the fugitive disentitlement doctrine. Thus, the government not only initiated the actions below, but it interjected the criminal cases into those actions after petitioners filed their claims. Having done so, to suggest that petitioners' oppositions to the government's motions to dismiss could not challenge the very basis for those motions is disingenuous, at best. Whether or not the issue of bad faith indictment is a possible defense in the criminal proceeding, the issue is nonetheless relevant as a basis for opposing the assertions of fugitive disentitlement made against claimants in these civil forfeiture actions.

CONCLUSION

For the foregoing reasons and the reasons set forth in the petitions for *certiorari* in these cases, the petitions for a writ of *certiorari* should be granted.

Respectfully submitted,

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